

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:PHI:TL-N-2824-01

RHGannon

date: October 10, 2001

to: Internal Revenue Service
409 Silverside Road,
Wilmington, DE 19809
Attention: Tom Keating, Case Manager

from: Associate Area Counsel (LMSB) - Philadelphia
Richard H. Gannon, Special Litigation Assistant

subject: [REDACTED], FKA [REDACTED] (a general
partnership)
Non Significant Advice Request

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Advice has been requested as to whether, for the purpose of applying the "TEFRA rules"¹ to the examination of transactions reflected on the return of [REDACTED] ("[REDACTED]") for the calendar year [REDACTED], [REDACTED] constitutes a "partnership" as that term is defined in I.R.C. § 6231(a)(1). For the reasons stated below, we conclude that it does not and that any adjustments affecting the taxable income of [REDACTED] for the year [REDACTED]

¹ i.e., Subtitle F, Chapter 63, Subchapter C of the Internal Revenue Code of 1986, Title 26 U.S.C.

generated by [REDACTED] transactions during [REDACTED] are to be governed by the ordinary deficiency provisions of the Internal Revenue Code.

FACTS:

Prior to [REDACTED], [REDACTED], a domestic general partnership, owned and operated a global [REDACTED] business under the "[REDACTED]" name² with a number of controlled foreign distribution subsidiaries operating throughout the world. Prior to [REDACTED], [REDACTED] was owned [REDACTED]% by [REDACTED] (" [REDACTED]"), a wholly owned subsidiary of [REDACTED], [REDACTED]% by [REDACTED] (" [REDACTED]"), also a wholly owned subsidiary of [REDACTED], and [REDACTED]% by [REDACTED] (" [REDACTED]"), a wholly owned subsidiary of [REDACTED], a domestic corporation (" [REDACTED]"). [REDACTED] and [REDACTED] were unrelated except through their interests in [REDACTED] and [REDACTED], a Dutch company conducting operations in Europe.³

Some time prior to [REDACTED], [REDACTED] and [REDACTED], desiring to liquidate their respective investments in [REDACTED] and [REDACTED], reached agreement with [REDACTED] (" [REDACTED]"), a Swiss corporation regarding the sale of the global [REDACTED] business. From what we have been able to learn from the four volumes of documents relating to the sales transaction, the process of selling the [REDACTED] business to [REDACTED] was accomplished in steps, starting with the sale of a number of companies, both foreign and domestic, to entities designated by [REDACTED] and finishing with the withdrawal of [REDACTED] from [REDACTED], taking with it [REDACTED]'s operating assets and liabilities and leaving behind a \$ [REDACTED] note issued by [REDACTED], a Delaware company.⁴

² The partnership will be sometimes be referred to as "[REDACTED]" and sometimes as "[REDACTED]" as the factual context demands.

³ [REDACTED] was owned [REDACTED]% by [REDACTED] a wholly owned, Netherlands subsidiary of [REDACTED], [REDACTED]% by [REDACTED], and [REDACTED]% by [REDACTED] itself.

⁴ [REDACTED] was recently formed, apparently to facilitate the [REDACTED] sale, the note being acquired with funds furnished by [REDACTED], and securitized with a Certificate of Participation purchased from one of the [REDACTED] trusts formed by [REDACTED] to monetize portions of its credit card receivables.

████ and █████ remained as general partners after the withdrawal of █████ from █████, and █████'s name was changed to █████ or "████". This occurred on or about █████. To our knowledge, there were no other partners of █████.

████ filed its █████ Federal Partnership Return on or about █████.⁵ The only copy of the return readily available to the Service in connection with its examination of █████ is a copy of the copy retained by █████ bearing the date (████).⁶ The return in question, consisting of over █████ pages, does not contain any document purporting to elect that █████ be treated as a TEFRA partnership for examination purposes. Schedule B, Line 4 of the █████ return states that the partnership is subject to the TEFRA rules and designates █████ as its Tax Matters Partner. In a memorandum from █████, █████ Director of Taxes to Tom Keating, the Service's Team Manager on the case, Mr. Keating states that Line 4 was "inadvertently checked" and that "████ does not wish to be subject to the consolidated audit procedures of IRC Sec. 6221 through 6233 for the █████ calendar year."

LAW AND DISCUSSION:

IRC § 6231(a)(1), as effective for taxable years ending after August 5, 1997, provides an exception to the application of

⁵ The period of limitations for the assessment of any income tax attributable to a partnership item in this case would appear to run on or about █████ - █████ from the date of this memorandum. While the period of limitations is normally extended pursuant to IRC § 6229(d) once a final partnership administrative adjustment or FPAA is mailed to a partnership's Tax Matters Partner (or "TMP"), the issuance of an FPAA normally contemplates the completion of a partnership audit. The audit in this case, at least as far as the █████ return is concerned, is in its early stages. Moreover, IRC § 6223(d) requires that a notice of the commencement of a TEFRA proceeding be mailed to partners at least 120 days prior to the mailing of an FPAA to the TMP. Fortunately, the non-TMP partners' remedies for the Service's failure to do so appear to be limited, in this case, to those set forth in IRC § 6223(e)(3) (i.e., to elect in or out of the partnership proceeding).

⁶ We are advised that you have requisitioned the original return.

the TEFRA Rules for a partnership having 10 or fewer partners consisting of individuals (other than nonresident aliens), C corporations or estates of deceased partners. IRC § 6231(a)(1)(B) provides an exception to the exception for those partnerships electing to have the TEFRA Rules apply. Treas. Reg. § 301.6231(a)(1)-1T(b)(2) provides that a partnership shall elect to have the TEFRA Rules apply

by attaching a statement to the partnership return for the first taxable year for which the election is to be effective. The statement shall be identified as an election under section 6231(a)(1)(B)(ii), shall be signed by all persons who were partners of that partnership at any time during the partnership taxable year to which the return relates, and shall be filed at the time (determined with regard to any extension of time for filing) and place prescribed for filing the partnership return.

A careful scrutiny of our copy of the partnership return has failed to disclose any statement remotely approaching an election of the type prescribed by the above regulation.

IRC § 6231(g)(2), added for taxable years ending after August 5, 1997, provides as follows:

(2) Determination that subchapter does not apply. If, on the basis of a partnership return for a taxable year, the Secretary reasonably determines that this subchapter does not apply to such partnership for such year but such determination is erroneous, then the provisions of this subchapter shall not apply to such partnership (and its items) for such taxable year or to partners of such partnership.

Given the fact that our examination of the retained copy of [REDACTED]'s partnership return for the calendar year [REDACTED] fails to reveal any statement electing to have the TEFRA Rules apply, any determination that the TEFRA Rules do not apply in this case would be, in our opinion, reasonable under IRC § 6231(g). This conclusion is bolstered to some extent by the fact that [REDACTED], [REDACTED] tax director, has stated that [REDACTED], the [REDACTED] % general partner of [REDACTED], does not want the TEFRA

Rules "applied to it" for the calendar year [REDACTED].

While standing alone, [REDACTED]'s statement is far from clear. First, the TEFRA Rules would be directly applicable to [REDACTED] and only indirectly applicable to [REDACTED], the majority partner of [REDACTED] after the [REDACTED] withdrawal from [REDACTED]. Moreover, [REDACTED]'s statement is ambiguous as to time. Does he mean that [REDACTED] does not presently (as of [REDACTED]) want the TEFRA Rules apply or that he (or [REDACTED] or [REDACTED]) has never wanted them to apply?

On the other hand, given Mr. Keating's written statement and the discussions between Mr. Keating and Service personnel (including, on August 15, 2001, the undersigned), the doctrine of equitable reformation might be applicable here. Simply stated, a court may reform a writing to conform with the actual understanding of the parties. Woods v. Commissioner, 92 T.C. 776 (1989). While we believe that Woods is slender authority for any attempt to put words into the taxpayer's mouth, we believe that [REDACTED] meant to say that [REDACTED] never meant the TEFRA Rules apply based on oral statements made to Service personnel on [REDACTED].

Given the fact that there is nothing in the record to show that [REDACTED] made the election contemplated by the regulation and that that fact, standing alone, would be sufficient to preclude the application of the TEFRA Rules in this case, we conclude that the TEFRA Rules do not apply regardless of [REDACTED]'s statement.

CONCLUSION

This concludes our advice in this matter. We are forwarding a copy of this memorandum to the Senior Litigation Counsel (HQ) (CC:LM:MTC:SLC) for mandatory ten day post review. We will promptly advise if we receive contrary advice from our national office.

RICHARD H. GANNON
Special Litigation Assistant

APPROVED:

JAMES C. FEE, JR.
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